No. 84-771

FILED
NOV 9 1984
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1984

L. ROBERT LEISNER,

Petitioner,

against

VICTOR S. BAHOU, as President of the New York State Civil Service Commission, BARBARA BLUM, as Commissioner of the New York State Department of Social Services, EDWARD REGAN, Comptroller, State of New York,

Respondents,

and

PETER MULLANY, individually and as Assistant Counsel, New York State Department of Social Services, THOMAS G. CONWAY, individually and as Counsel, New York State Department of Agriculture and Markets, WILLIAM BONK, individually and as Director of Personnel, New York State Department of Agriculture and Markets, J. ROGER BARBER and JAMES GARLICK, as Commissioners, New York State Department of Agriculture and Markets,

Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Batavia, N.Y. (716) 344-2000

98 pp
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Questions Presented

I.

Was the 14th Amendment due process in form or substance violated where a rating performance procedure giving no hearing, but requiring appropriate documentation by a rater barred by Civil Service "ground rules," in the only identifiable documented instance among conclusory evaluations shows faithful observance of the Constitutional Oath and the Federal Court on the Supremacy Clause, but the Commissioner was later found in widespread continuing contempt of Court, on the same issue, and meanwhile the hearing officer was barred from all employment opportunity by an obstructed Civil Service unsatisfactory performance rating review based on a layman's report not available that "he did not understand the law" and "he appeared to be marching to the beat of a different drummer," and this ended in a Final Judgment of no relief?

II.

Does the Fourteenth Amendment permit State Commissioners and their counsel to turn the hearing officer's faithful observance and keeping of the Constitutional Oath in performance of his duties into a shiboleth when:

A. The Commissioners and their counsel choose to disregard a Federal class injunction in a continuing and widespread fashion in Fair Hearings?

B. He refuses to participate when the Commissioners, their counsel and prosecutors choose to disregard Constitutional minimums for hearings in Agriculture and Markets as a regular ongoing practice by hearings in

which hearing officers are supervised and controlled by the prosecutor and the hearing recommendation and outcome is controlled and made by the division which initiated the inspection and prosecution?

C. Where all of the respondents have denied the relevancy of the Constitutional oath for the Hearing Officer, is he entitled to relief?

III.

Where the Hearing Officer is initially assured there would be no commingling of the hearing and prosecuting functions and a year and one-half later the respondents direct him to subserve the hearings to the prosecutors, he refuses and leaves and the respondents subsequently injure him because of this and they continue their unconstitutional hearing practice unknown to the shopkeepers and farmers, are there violations of the Fourteenth Amendment and Title 42, Sections 1983 and 1985?

IV.

Where hearing officers *and* hearing outcomes are totally controlled by the prosecutors *and* the prosecuting division of the State Agriculture and Markets, are the Fourteenth Amendment due process and equal protection guarantees violated?

V.

Where the respondents including Civil Service and Social Services the State Agriculture and Market inflicted injuries upon a Hearing Officer for attempting to maintain the integrity of the hearings and the equal protection therein, did they confer standing upon him for damages and for declaratory relief?

TABLE OF CONTENTS.

	Page
Questions Presented	i
Table of Authorities	v
Jurisdiction	3
Opinions and Reports Below	4
Constitutional Provisions Involved	5
Nutshell of Case	7
Facts	8
Court Proceedings	9
Appeal	17
Severed Final Judgment	18
Reasons for Granting the Writ	19
Under *Magna Carta*, the Constitution	29
Conclusion	30
Appendix "A"—Order of the New York Court of Appeals Dated March 22, 1984 Dismissal.	1a
Appendix "B"—Order of the State of New York Court of Appeals Dated June 14, 1984 Denying Leave to Appeal	3a
Appendix "C"—Order of the State of New York Supreme Court, Appellate Division, Third Department Dated and Entered on November 9, 1983.	5a
Appendix "D"—Opinion of the New York State Supreme Court, Appellate Division, Third Department, Dated November 3, 1983.	9a

Page

Appendix "E"—Order of the Supreme Court Judge Klein, Albany County, New York Dated November 30, 1981. ..... 15a
Appendix "F"—Decision of the Supreme Court Justice Klein, Albany County, New York Dated October 28, 1981. ..... 18a
Appendix "G"—Judgment of the Supreme Court Justice Torraca, Albany County Dated June 22, 1982. ..... 23a
Appendix "H"—Decision of the Supreme Court Justice Torraca, Albany County Dated May 27, 1982. ..... 25a
Appendix "I"—Statutes Involved. 28a
Appendix "J"—Partial Judgment and Order Dated December 12, 1978, Entered December 15, 1978 in a class action *Swift v. Toia*, United States District Court, SDNY "Bill of Rights" day order 33a
Appendix "K"—Petitioner's Reply to Respondent's Answer 37a
Appendix "L"—Petitioner's Reply to Joseph R. Healy Affidavit. 40a
Appendix "M"—Notice of Appeal to Court of Appeals 48a
Appendix "N"—Schedule of Probationary Reports and "Bill of Rights" day class Order. 50a
Appendix "O"—Rescheduling exhibits 51a
Appendix "P"—*Magna Carta* (N.Y. Ct. of Appeals) . 59a

Page

TABLE OF AUTHORITIES.

CASES:

Albermarle Paper Co. v. Moody, 422 U.S. 405 27
Bacon v. Toia, 437 F. Supp. 1371 (1977) 28
Bates v. County of Steuben, 113 Misc. 2d 68, 448 N.Y.S. 2d 625 24
Blum v. Bacon, 457 U.S. 132 7,28
Board of Regents v. Roth, 408 U.S. 564 25
Conley v. Gibson, 355 U.S. 41 26
Duchesne v. Sugarman, 566 F2d 817 (2d Cir. 1977).. 26
Felder v. Foster, 71 A.D. 2d 71, 421 N.Y.S. 2d 471 25
Foman v. Davis, 371 U.S. 178 26
Goldberg v. Kelly, 397 U.S. 270 23
Green v. McElroy, 360 U.S. 474 23
In re Murchison, 349 U.S. 133 23
Klostermann v. Cuomo, 61 N.Y. 2d 525 25
Martinez v. California, 447 U.S. 277 25
Nash v. California, 613 F.2d 10 29
Olmstead v. U.S., 277 U.S. 438 27
Ross v. Moore, 502 F. Supp. 543 23,25
Swano v. Ambach, 108 Misc. 2d 142, 437 N.Y.S. 2d 44 19,20
Swift v. Blum, 502 F. Supp. 1140 *sub. nom.* 7,10, 12,13,20,22
Swift v. Toia, 450 F. Supp. 983 7,10,22
Swift v. Toia, 461 F. Supp. 578 7,10,22
Testa v. Katt, 330 U.S. 86 25
Tumey v. Ohio, 273 U.S. 510 23
Wang Yang Sung v. McGrath, 339 U.S. 33 23,24
Wood v. Strickland, 420 U.S. 308 25
Woods v. State, 469 F. Supp. 1127 20

Page

STATUTES:

New York CPLR 103c 6
New York CPLR 7804e and f 6
New York CPLR 7806 6,26
New York State Civil Service Law:
Section 106. 6,17,20,21
Section 107. 17,20
State Administrative Procedure Act, Sections 303, 307 24
Title 42, U.S.C.:
Section 1983 ..... ii,6,13,17,18,21,26,27,30
Section 1985 ..... ii,2,4,6,8,9,17,18,21,26,27,28,30

CONSTITUTION: (United States)

Article VI, Clause 2 and Clause 3 5
Article XIV ..... *passim*

TEXT:

Administrative Adjudication in the State of New York, Volume 3, Page 149, *Agriculture and Markets, Benjamin Commission Report to Governor Lehman 1942*. 24

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Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Justices of this Court:

The Petitioner, L. ROBERT LEISNER, prays that a Writ of Certiorari issue to the New York Court of Appeals:

Petitioner took the Constitutional Oath in January, 1952 on entering Military Service and served honorably for a full term of service in the Korean War. In July, 1954, Petitioner took the Constitutional Oath as a lawyer and member of the New York Bar in the State Court, and Petitioner also took the Oath in the Federal District Court W.D.N.Y. in 1954. Petitioner took the Constitutional Oath in this Court on March 1, 1966 *in your presence* and was admitted to this Court on motion of John Lord O'Brian, Esq., a distinguished member of this bar and former U.S. Attorney W.D.N.Y.

Petitioner has faithfully adhered to the Constitutional Oath and as a direct consequence has suffered great harm and injury and that fact requires Petitioner to seek the help of this Honorable Court.

No opinion save being the same words of the attached order, was rendered by the New York Court of Appeals in the course of denying leave to appeal the final judgment on the severed Article 78 proceeding involving the Constitutional Oath and the supremacy clause and following the law of the land in his duties the constitutional protection of the hearing officer, or the final dismissals of severed claims for damages and declaratory relief under the Fourteenth Amendment and *Title 42 USC Section 1985* on June 14, 1984 (A. 2a).

Earlier, on March 22, 1984, the Court of Appeals *sua sponte* dismissed Petitioner's constitutional appeal, made as a matter of right (and based on the Fourteenth Amendment and the Constitutional Oath and the same grounds as above. The dismissal was on the further grounds that no substantial *constitutional question* is directly involved on the appeal (A. 2a) *61 N.Y. 2d 985 (same words).*

Jurisdiction

The order of the Court of Appeals was entered on March 22, 1984. A timely motion for leave to appeal was made and denied on June 14, 1984.

A timely application for extension of time to November 11, 1984 was granted by Mr. Justice Marshall on September 17, 1984.

This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

Opinions and Reports Below

The order and memorandum of the New York Court of Appeals that no substantial question is involved in the appeal from the final affirmance of the final judgment in the severed Article 78 proceeding, or the final affirmance of final dismissals (of severed claims for damages and declaratory relief under the Fourteenth Amendment or Title 42, U.S.C. 1985) is officially reported at 61 N.Y. 2d 985 and 475 N.Y.S. 2d 282. (See Appendix "A" at Page 1a).

Leave to appeal was denied by the N. Y. Court of Appeals at 62 N.Y. 943 and 62 N.Y. 2d 905 (See Appendix "B" at Page 13a).

Both the N. Y. Supreme Court judgment and decision of Justice Torraca on the severed Article 78 not officially reported appears in the appendix "G" at Page 23a and "H" at Page 25a.

Both the N. Y. Supreme Court order and decision of severance and final dismissal of severed claims for damages and declaratory relief under the Fourteenth Amendment and Title 42 U.S.C. 1985 not officially reported appear in the appendix "E" at Page 16a and "F" at Page 18a.

Both the order and the opinion of the Appellate Division, Third Dept., reported at 97 AD 2d 860; also 469 N.Y.S. 255 appear in the appendix "C" at Page 5a and "D" at Page 9a.

Constitutional Provisions Involved

The United States:

Article VI. Supreme Law of Land.

* * *

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Clause 3. Oath of office; Religious test denied

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

* * *

Art. XIV
July 28, 1868

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Statutes Involved appearing in the appendix:

United States:

Title 42 THE PUBLIC HEALTH AND WELFARE

Chapter 21 Civil Rights

Section 1983 Civil Action for Deprivation of Rights

Section 1985 conspiracy to interfere with Civil Rights—Preventing officer from performing duties;

(2) Obstructing justice, intimidating party witness or juror,

(3) Depriving persons of rights or privileges.

New York State:

The Civil Service Law Section 106

New York CPLR 103c
New York CPLR 7804e and f
New York CPLR 7806

Nutshell of Case

The Petitioner has been barred and obstructed from further state employment as a result of an illegal and unconstitutional 1978 annual Civil Service performance rating as a permanent hearing officer.

In a nutshell, Petitioner declined to preside at hearings where he would be supervised by the man who supervised prosecutions, he moved to an agency where though 1) bound by *Constitutional Oath* to follow the law of the land and 2) binding *Federal Court* class action injunctions against violations of the *supremacy clause* where he was rated by a rater 3) who was barred by Civil Service Rules from participating in an annual rating and that rating was used as a 4) bar to all reinstatement or employment with State agencies. The Petitioner asserted violations of the 14th Amendment, due process of law and the protections afforded a hearing officer bound by oath to observe the law of the land. Binding Injunctions, *Bacon v. Toia*, 437 F. Supp. 1371 (1977) (Emergency Aid) and *Swift v. Toia*, 450 F. Supp. 983 and 461 F. Supp. 578 Supremacy Clause. Subsequently, CONTEMPT OF COURT, *sub nom. Swift v. Blum*, 502 F. Supp. 1140 retroactive class relief. Also in *Bacon* subsequently, *sub nom. Blum v. Bacon*, 457 U.S. 132 (Supremacy Clause, Emergency Aid). Petitioner followed the Federal law and decisions of the N.Y. Court of Appeals. Civil Service reported he "marches to the beat of a different drummer." The severed final judgment of an unsatisfactory performance rating violates the Fourteenth Amendment, obstructs and harms Petitioner and appears to defeat any review and appears to defeat the reinstated actions. So do affirmance of severed final dismissals of claims for damages and declaratory relief under the Fourteenth

Amendment and Title 42 U.S.C. 1985. While the Petitioner gives the fuller *facts*, court proceedings at pages 9, 13, and the appeal at pages 17, 18, the EXTRAORDINARY reasons for granting a writ of certiorari appear at page 19 of this petition.

Facts

Petitioner, a permanent New York State hearing officer in the competitive Civil Service Class since June, 1970, and bound by Constitutional Oath, both as a lawyer and a hearing officer, left Agriculture and Markets due to conflict of interest when supervised by an attorney supervising prosecutions and took up work as a permanent New York State hearing officer on April 20, 1978 in Social Services.

After Petitioner's probation was illegally extended several times in late 1978, his personnel file disappeared in the fall of 1978 and Petitioner was compelled to bring a court proceeding in February, 1979, to stop a summary dismissal, to maintain his position. Petitioner obtained a stay of Social Services illegal termination. Social Services having no answer to the stay and not desiring to litigate, Petitioner left Social Services "in consideration of the opportunity to seek employment with another agency" at the end of June, 1979.

The Social Services issued an unsatisfactory annual Performance Rating for 1978, but and then the Social Service and Civil Service respondents obstructed and aborted Petitioner's Civil Service appeal of the unsatisfactory rating. Such a rating is used to bar reinstatement and obstruct State employment (R. 261, Exhibit B, No. 1a).

The appeal was aborted by false computer entries and statements as to his status. After the appeal was discovered to be aborted, it was obstructed.

Court Proceedings

Petitioner brought an Article 78 proceeding to review the Civil Service unsatisfactory annual rating which was a bar and obstruction to employment. In the Article 78 proceeding, the Petitioner asserted violation of the due process (R. 90, No. 32; R. 91, No. 35), the Fourteenth Amendment and the Constitutional Oath (R. 90, No. 30), and the hearing officer's duty to observe the law of the land.

Petitioner also brought action and claims for damages for the obstruction to employment and for declaratory relief that New York "Fair Hearing" procedures which obstruct a hearing officer in his function violate the Fourteenth Amendment and Title 42 U.S.C. Section 1985 Petition (R. 96 and 97, Nos. 57-61; R. 111, Nos. 1, 3 and 5). Also, Reply Affidavit in Opposition to Motion (R. 122, No. 6, 7, 8; R. 128, Nos. 34 and 35).

Petitioner also brought a motion to annul the stipulation of settlement wherein he agreed to resign effective June 29, 1979, "In consideration of the opportunity to seek employment with another agency," the respondents having obstructed and barred his employment with other agencies (R. 92, No. 39, Petition; (R. 96 and 97, Nos. 57-61, Petition; R. 111, Nos. 1, 3 and 5). Also, (R. 122, Nos. 6, 7, 8, Reply Affidavit in Opposition to Motion; Nos. 34 and 35).

On the Article 78 proceeding all of the raters evaluations were wholly conclusory and gave no identifiable instances or incidents *save one evaluation* (Evaluation No. 1, 12/6/78, R. 276, Exhibit F-2) which stated "missed issues necessitating rescheduling" of a Fair Hearing.

On the same rescheduling "incident" the rater's *own rescheduling letter* (R. 277, Exhibit F-3, Reply to Answer) stated the Fair Hearing was rescheduled at the agency request because a witness had not been available to testify. This contradiction was pointed out repeatedly. (R. 91, No. 36, R. 139, R. 164, 165).

On the same "Fair Hearing" case the Cornell Legal Aid Society had 2 briefs (R. 278, 279) and the second brief confirms the issues and rescheduling circumstances. These briefs were pointed out to the supervisor and throughout (R. 257, No. 61).

Additionally, the issue was one in which the Federal Court on May 1, 1978 [Law Day] declared the respondents' alleged policy violative of the Supremacy Clause of the Constitution, *Swift v. Toia*, 450 F. Supp. 983, cited in Fair Hearing brief (R. 285, Exhibit F-11). On November 30, 1978, the Federal Court enjoined defendants' practice and policy as violative of the Supremacy Clause and granted class relief. *Swift v. Toia*, 461 F. Supp. 578 (R. 256, Reply to Answer, No. 57).

On November 1, 1978, Petitioner observed the Supremacy Clause, independently confirmed by the Cornell brief (R. 279, Exhibit F-5, Reply to Answer; R. 257, No. 261).

On November 12, 1980, in the same case *sub nom. Swift v. Blum*, 502 F. Supp. 1140, the court, at page 1142 under *"CIVIL CONTEMPT"* finds "blatant disregard of this Court's order" and at page 1143 provided restoration of benefits to thousands of needy children and for future violations assessed "a $1,000. fine for each fair hearing decision rendered 30 days subsequent to the filing of this opinion which fails to comply with the December 15, 1978 [Bill of Rights Day] order and does not provide for restoring wrongfully withheld benefits retroactive to that date."

The Cornell Legal Aid fair hearing briefs were brought to the attention of the supervisor in 1978 (R. 163, also Exhibit F-4 of Reply to Answer, R. 278) and to the courts throughout.

Petitioner assured he was permanent and a stipulation "in consideration of the opportunity to seek employment with another agency" that the Social Services doubted the performance rating would even be forwarded, and even if it were, in all events he had the right of appeal. Petitioner's appeal was aborted by false conceded computer entries, and obstructed (R. 86, No. 19, R. 226, Exhibit 14-5). Voluntary recommendations were shut off (R. 96, No. 55).

A break of one year service also breaks reinstatement opportunity rights and increases obstacles to employment (R. 180, No. 11, R. 180, No. 39).

Petitioner was rated by a rater who served as Petitioner's supervisor from October 26, 1978 to December 31, 1978. The Civil Service "Ground Rules" (R. 157, R. 223, Exhibit 14-2, R. 257, Reply No. 61) state that a supervisor may not participate in an annual rating unless he has supervised the employee for at least three months.

Since there is no hearing at any stage (R. 197, No. 43), the Civil Service rating procedures also requires "appropriate" documentation (R. 157, R. 263, Exhibit C of Reply). The actual "appropriate documentation" memorandum (R. 263, Exhibit C, Reply) that the Appellate Division found "is binding on the agency," did not appear in any return by the agency. The Civil Service "Ground Rules" (Exhibit 14-2) were ignored by all throughout.

Petition asserted the evaluation of a hearing officer in the fashion that has taken place here violated the integrity guaranteed to fair hearing officers Federal Constitutional law, a right protected by the due process clause of the Constitution (R. 90, Nos. 31, 32, R. 90, No. 35, R. 91, No. 34, R. 89, No. 28).

The Civil Service layman's report *never available* to the Petitioner was produced on the returned answer of the Article 78 in Dec., 1981 and in its conclusion, reports "he either did not understand the law and regulations or he deliberately ignored them. He appeared to be marching to the beat of a different drummer."

The false statement (R. 91, No. 36, R. 93, No. 42, R. 139, R. 161, 162, R. 163-165) on the rescheduling circumstance and the two Cornell Legal Aid briefs on the issue in the rescheduled case had been set out in the original petition and record filed with the petition. In January 1982 petitioner learned of Social Service Respondent-Defendants continued wide spread contempt. Now, the "blatant disregard," *Swift v. Blum, (Swift v. Toia)*, same case, 502 F. Supp. 1140, Page 143, 144 and subsequent contempt were explicitly set out to the New York Court (R. 256) in the Article 78 and to the appeals to the higher courts once the *layman's secret report* was produced in Dec., 1981.

Petitioner asserted that "Due process requires some substance and does not countenance delays, bad faith, aborted appeals, omitted and concealed papers and totally ignoring the law and oaths and duties and rights of the hearing officer" (R. 241, No. 8, Reply). "Petitioner specifically, specially and separately invokes" "the Fourteenth Amendment to the United States Constitution" (R. 241, No. 11, Reply). "The Petitioner, a citizen, a lawyer and a Hearing Officer was likewise protected in his duty by the Fourteenth Amendment" (R. 256, No. 59, Reply; R. 259, No. 68, Reply).

Against a motion to dismiss, Petitioner had also asked leave to amend to assert violations of Title 42 U.S.C. 1983.

On the August 1981, motion to dismiss, the Court had severed the Article 78 proceeding and allowed it to proceed, severed the remaining claims and reinstatement proceeding and dismissed them all (See App. "C" at page 5a). Petitioner appealed the order of dismissal of all severed claims. The Court as well as petitioner was unaware of the widespread continuing disregard of the *Swift Toia* Dec. 15, 1978 order and the "numerous conferences, held before the Court at which defendant was repeatedly cautioned, warned and ordered . . ."

On the severed Article 78 proceeding the Court later gave judgment affirming the 1978 unsatisfactory rating which had been used as a bar and obstacle to employment, stating a thorough and sincere review and evaluation was made of petitioner's performance and there was a rational basis for the determination (Opinion attached). The Court opinion ignores the Civil Service due process "Ground Rules" barring participation of the annual rater by a supervisor of less than 3 months (R. 222, 223, Exhibit 14), the protection afforded the hearing officer bound by Constitutional Oath to follow the law of the high courts and the CONTEMPT of the Federal Court by the Social Service respondents and defendants of the class injunction against the violation of the Supremacy Clause. *Swift v. Blum*, 502 F. Supp. 1140. This was the only documented identifiable instance in all the conclusory, contradictory evaluations.

In the final dismissal of severed claims it also appeared that Petitioner served continuously as a permanent hearing officer from June, 1970 until June 30, 1979. All service was satisfactory (R. 85, No. 10), save the 1978 service in Social Services appealed herein (R.

98, No. 64). Along with the separate earlier appeal now the Final Judgment in the Article 78 affording no relief from the rating followed.

Petitioner served as a hearing officer from May 27, 1976 to April 19, 1978 in Agriculture and Markets. Before commencing service he pointed out that a mixture of prosecuting and adjudicating functions would violate constitutional safeguards in Agriculture and Markets in hearings and was assured there would be none (R. 102, Nos. 92-96). Initially there was no mixture. Subsequently in the summer of 1977, the functions were commingled physically (R. 103, No. 101). Petitioner, by written delegation of Commissioner Barber, May, 1976, made reports and recommendations on hearings, but on November 21, 1977, Thomas Conway, Counsel, directed Petitioner to delete recommendations and send the hearing officer reports to the operating division which had done the inspection and initiated the prosecutions (R. 105, Nos. 109, 110, 116).

Petitioner sought relief from the illegal and unconstitutional conflict of interest from Counsel Conway without avail (R. 105, No. 110).

In January, 1978, petitioner was assigned to hold a hearing with Dennis P. Buckley now acting as his immediate supervisor as the attorney prosecutor (R. 105, No. 112).

Petitioner sought relief from Counsel Conway and Commissioner Barber in writing and also in conversations with Deputy Commissioner Garlick and Dennis P. Buckley, (R. 105, Nos. 112, 113) pointing out the conflict of interest under the Public Officers Law, the State Administrative Procedure Act and the Federal Constitution (R. 105, No. 113) and the N.Y.S. Hearing Officers Manual, p. 15 (also Exhibit H-T, "Due Process" R. 290).

> "A presiding officer who presides at the reception of evidence, shall not be responsible to or subject to the supervision of an attorney engaged in the prosecuting function."

Each time he was ordered to hold the hearing in which he would preside at the reception of evidence presented by Dennis P. Buckley who was now his immediate supervisor and supervised the prosecution. Although Petitioner brought this to the attention of Counsel Conway two times, and Associate Attorney Dennis P. Buckley three times, and on three separate occasions directly requested to be relieved of the assignment or the assignment of another attorney, they declined the request.

On January 27, 1978, Petitioner filed a recusal certificate of disqualification to such effect (R. 108, Nos. 116, 118). After February 7, 1978, Petitioner was given an adverse appraisal or rating purporting to rate Petitioner hearing officer. The rater was Dennis P. Buckley who was in charge of prosecutions and the reviewer was Thomas P. Conway, Counsel.

Petitioner hearing officer was now in 1978 appraised and supervised by a prosecuting attorney and the same attorney supervised prosecutions (R. 103, Nos. 130, 131). He had previously been ordered in November to delete recommendations from his hearing reports by Counsel Conway and to send hearing officers reports to the operating divisions which had done the inspection and initiated the prosecution for recommendation despite a delegation May 27, 1976, by Commissioner Barber to make recommendations in accord with the facts and the law.

On March 2, 1978, Petitioner received a new delegation of authority to hold hearings only, issuing subpoenas, etc., but with not even authority to make report, or to make recommendations or to do anything after taking the evidence. The prior delegation of 1976 was revoked. He was merely to forward the transcript to the prosecuting division (R. 108, No. 130).

On March 13, 1978, Petitioner again wrote to Commissioner Barber about the commingling of the prosecuting and hearing offices and functions and the illegal rating (R. 108, No. 129). The hearing functions and the prosecuting functions were commingled and all personnel in the hearing office section left (R. 109, Nos. 134, 135, 116-119).

Petitioner's move from Agriculture and Markets was the direct result of this conflict of interest situation (R. 140, 141).

Thereafter, the Agriculture and Markets Department, William Bonk, Director of Personnel, gave out false information which effectively destroyed employment opportunities (R. 99, Nos. 72-78) (Appellate Division Opinion Appendix "D" at pages 11a, 12a). Petitioner's appointments to work vanished and on inquiry in late 1980, Petitioner was told fearfully "that they are very angry and upset because Agriculture and Markets doesn't want it." (R. 100, No. 77).

After Petitioner left Agriculture and Markets, the Agriculture and Markets hearings were subject to the prosecution or were, by contract, hearing officers at grossly disparate or varying rates of pay (R. 100, Nos. 83-85).

Petitioner having moved as a direct result of the conflict of interest and terrible injury was now inflicted (R. 100, Nos. 75-77) by William Bonk and the Department of Agriculture and Markets. The Agriculture and Markets Respondents prevented his employment because Petitioner attempted to maintain the integrity of the hearings (R. 122). Petitioner also asserted harm as a member of the consuming public. Petitioner brought action for damages and for a declaratory relief from the Agriculture and Markets hearing situation, based on violations of the New York Civil Service Law, Sects. 106 and 107 and Title 42, U.S.C. 1985, and the 14th Amendment (R. 100, No. 78; R. 101, No. 89; R. 101, No. 141). Petitioner also requested leave to amend to allege the violation of Title 42 U.S.C., Sect. 1983 (R. 128, No. 35).

Appeal

On appeal to the Appellate Division that Court reinstated an action for damages against William Bonk, Director of Personnel Agriculture and Markets and the severed reinstatement proceeding or motion against the stipulation and affirmed the dismissal of the claims for damages and declaratory relief under *Title 42 USC 1985* and the Fourteenth Amendment.

On appeal from the Severed Final Judgment Article 78 the Petitioner asserted 1) the violations of Civil Service Ground Rules and the lack of required documentation of any incidents as violations of due process, also, the protection afforded the hearing officer in following the Constitutional Oath, and the Federal contempt case in the class action where Petitioner had followed the Federal Court decisions of May 1, 1978 (Law Day) on the Supremacy Clause, and its later decision of November

30, 1978 and its injunction thereon entered on December 15, 1978 (Bill of Rights Day) on the *only* issue ever identified by respondents in all their conclusory assertions.

He also asserted the Constitutional Rights outlined above the Fourteenth Amendment, Title 42 U.S.C. section 1983 and section 1985.

The Constitutional Oath, the Supremacy Clause, the hearing officers need for protection, the due process violation of the rating. He also asserted standing, the obstructions, a justiciable controversy, jurisdiction, injuries, and grounds for claims for damages and declaratory relief.

Severed Final Judgment

Both the Appellate Division decision, and also the Court of Appeals holding that no substantial Constitutional question is involved on the *severed final judgment* on the rating appears to violate the Fourteenth Amendment and to be contrary to decisions of this Court.

It also renders meaningless and appears to defeat the reversal which permits a motion on the reinstatement.

The affirmance of the final dismissal of severed claims for declaratory and damage relief also appear to violate the Fourteenth Amendment and Title 42 USC 1983 and 1985 and to be contrary to decisions of this Court.

Reasons for Granting the Writ

FIRST: The Constitutional Oath has been turned into a grotesque shiboleth.

The Constitutional Oath, the supremacy clause and the Fourteenth Amendment due process and equal protection are the foundations of our government. Faithful observance and keeping of the Constitutional Oath by a Hearing Officer become impossible when a Commissioner:

(a) chooses to disregard Federal Court orders in widespread continuing policy, or

(b) chooses to put the Hearing Officer under the supervision of the prosecutor and counsel orders him to delete recommendations, forwarding the hearing to the division initiating inspection and prosecution.

A Hearing Officer who maintains integrity of the oath, the supremacy clause, due process and equal protection must inevitably be destroyed in such a situation.

If he maintains the integrity of the Constitutional Oath, "and leaves in consideration of the opportunity to seek employment with another agency," he must still be viewed as a threat, destroyed, and barred in such a situation.

SECOND: The Fourteenth Amendment due process requires some substance. It also affords some protection. Here every evaluation is conclusory.

Swano v. Ambach, 108 Misc. 2d 142, 437 N.Y.S. 2d 44 throws out an evaluation based on wholly conclusory material.

> "The Court has reviewed the return provided by respondents and cannot find any evidence in the administrative record which would support

> petitioner's performance evaluation. The only adverse material is the conclusory statements contained in petitioner's performance evaluation." *Matter of Swano v. Ambach*, 108 Misc. 2d 142.

In Woods v. State, 469 F. Supp. 1127, for example, there were letters of complaint, memoranda to Woods, over 100 notes to Woods, a Board hearing with counsel present, forty-eight of Woods unsatisfactory decisions. Woods performance rating related to the year 1977.

In all the conclusory statements the only identifiable instance is a false evaluation that rescheduling was necessitated for failure to recognize the issue when the rescheduling letter states it was rescheduled at the request of the agency to permit a witness to testify. The same instance had further documented proof of Petitioner's faithful adherence to the Constitutional Oath in following the law of the land as spelled out in *Swift v. Toia* and sub *Swift v. Blum*. While the Commissioner followed a widespread continuing practice in disregard of a Federal Court order enjoining violations of the supremacy clause on the same issue. The point is that *all* of the evaluations are *conclusory* and contrary to each other. That is *not* "appropriate documentation." The only "appropriate documentation" is one of the hearing officer observing the law and the Commissioner maintaining a widespread policy of contempt for law. "However, in view of the numerous conferences held before this Court during the eighteen months following the entry of judgment at which defendant was repeatedly cautioned, warned and ordered both to restore benefits to the date of judgment and cease relying . . ."

THIRD: Sections 106 and 107 of the Civil Service and the Civil Service Provisions of the N. Y. Constitution protect civil servants.

"Any commissioner or any other person who shall wilfully by himself or in cooperation with other persons, defeat, deceive, or obstruct any person in respect of his or her right of . . . appointment . . . promotion or reinstatement pursuant to the provisions of this Chapter or the rules and regulations . . . or 'who shall wilfully make any false representations concerning the same or concerning the person' [certified] for the purpose of either improving or injuring the prospects or chance of any person . . . 'registered or certified' ". Section 106 *forbids* that activity.

42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USC 1985 (2) and (3) also apply.

After transferring from Agriculture and Markets in April, 1978, Petitioner's Social Service probation had been extended illegally three times, in 1978 his personnel files had mysteriously vanished throughout the fall of 1978. He had been terminated in 1979 without notice or hearing (R. 93, p. 42). Then the "performance" charade.

Throughout 1979 and 1980, Petitioner's Civil Service appeals were aborted and obstructed. Finally a secret report that "he appears to be marching to the beat of a different drummer" (R. 236). To bar a hearing officer when he adheres to Federal decisions in class actions followed by an injunction against respondents, and subsequently contempt violates these statutes.

FOURTH: There is a dire necessity to protect the integrity of the Hearing Officer or ALJ who observes and keeps the oath. The only hearing thousands of citizens obtain at the hands of government is a hearing before a Hearing Officer. The Constitutional Oath, the law of the land, the supremacy clause which was explicitly determined in *Swift v. Toia*, 450 F. Supp. 983 and ordered controlling 461 F. Supp. 578, was followed by widespread continuing contempt, in *sub nom. Swift v. Blum*, 502 F. Supp. 1140. The "blatant disregard" of the Federal Court holding and injunction against the state policy violating the supremacy clause necessitated reopening thousands of cases of needy children."

The consent decree of *MLC v. Citkin SDNY* reopening 55,000 cases of unemployment insurance hearing appeals to the Appeal Board, including all claimant appeals therefrom to the Appellate Division, indicates a growing state official lawlessness and gross indifference to the hearing function.

The "retroactive relief" to needy children and others, moved or never found or located, with closed cases, is impossible. Lawlessness is thus rewarded and the hearing officer or ALJ who keeps the Constitutional Oath is destroyed.

If the Hearing Officer function is not protected when he keeps the oath under such circumstances, the future integrity of administrative hearings is destroyed or jeopardized in the only hearings hundreds of thousands of citizens ever receive.

FIFTH: Having sought to uphold equal protection and due process, the hearing officer was grossly denied due process. Here from beginning to end, the raters and layman's report of the contract interviewer without hearing have been validated up to the New York Court of Appeals. "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy is of course the general rule . . ." *Tumey v. Ohio*, 273 U.S. 510.

> "To use superficially adequate procedures to effect a deliberate concealment of arbitrariness would certainly violate due process," at 554. *Moore v. Ross*, 502 F Supp 543.
>
> "Certain principles have remained relatively immutable in our jurisprudence. 'One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.' " *Goldberg v. Kelly*, 397 U.S. at 270, quoting *Green v. McElroy*, 360 U.S. 474, 496-497.
>
> "Finally the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and the evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. at 271.
>
> "And of course an impartial decisionmaker is essential. *Cf. In re Murchison*, 349 U.S. 133 * * * *Wang Yang Sung v. McGrath*, 339 U.S. 33, 45-46." *Goldberg v. Kelly*, 397 U.S. 254 at 271.
>
> "Indeed to so construe the Immigration Act might again bring it into Constitutional jeopardy. When the Constitution requires a hearing it requires a fair one, one before a tribunal which meets as least prevailing standards or impartiality." *Wang Yang Sung vs. McGrath*, 339 U.S. 33 at 50.

Section 303, State Administrative Procedure Act, provides for presiding officers, and Section 307 provides that there shall be no *ex parte* communications and no aid or assistance from personnel engaged in the investigative or prosecuting functions of the case under consideration or factually related case.

> "Occasionally an officer of the Legal Bureau has presided at a hearing and another officer of the same Bureau has acted as the Department's litigating representative in the same case. This has created an unfortunate impression and should be avoided." "*Administrative Adjudication in the State of New York.*" Volume 3, Page 149, *Agriculture and Markets, Benjamin Commission Report to Governor Lehman 1942.**

New York State Civil Service Manual for Administrative Adjudication states as a "Restraint":

> "He should not be subordinate to the agency personnel who are engaged in the performance of the investigative or prosecuting functions." (Page 15 of Manual.)

A time barrier will not apply where the claim is continuing constitutional or statutory duty. *Bates v. County of Steuben*, 113 Misc. 2d 68, 448 N.Y.S. 2d 625, at 628.

> "Where a 'person's good name, reputation, honor or integrity' are 'at stake,' where the State imposed on him a stigma or other disability (R98 p 65, 66, 67, 68), that foreclosed his freedom to take advantage of other employment opportunities."
>
> "Where the state invoked a policy (R261) (paragraph on reinstatement 1b) to bar the [person] from all

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* This study is noted in *Wang Yang Sung v. McGrath*, 339 U.S. 33 at Page 38, Note 7. The 4 volume study was the result of public concern with the abuses by the Government Agencies and Commissioners. A special Moreland Act Commission was appointed for this study, filed on the eve of World War II.

> other public employment in state [agencies], for to be deprived of future opportunity for it is certainly no small injury." *Board of Regents v. Roth*, 408 U.S. 564 at 573, 574.

As to the damage action the defendants assert the Court lacks subject matter jurisdiction.

> "None of the defendants possessed immunity absolute or qualified from injunctive or declaratory relief." *Felder v. Foster*, 71 A.D. 2d 71 at 75, 421 N.Y.S. 2d at 471.

> "Inasmuch as the underpinnings of legislative immunity do not exist in the executive realm, the Supreme Court has recognized only a qualified immunity for executive officials and administrators." (Citing *Wood v. Strickland*, 420 U.S. 308 and others.) *Felder v. Foster*, 71 A.D. 2d 71 at 75-76, 421 N.Y.S. 2d at 472.

Clearly, individuals sued individually do not have immunity.

SIXTH: Article 78 not only covers damages it also covers declarations and mandamus. *Klostermann v. Cuomo*, 61 N.Y. 2d 525 definitively states that declaratory judgment and mandamus are available.

Where the respondents by their attorney deny the relevancy of the constitutional oath of a hearing officer in this situation he is entitled to a declaration and Mandamus. Otherwise, must a hearing officer forswear the Constitutional oath to work for respondents? State Courts may not refuse where there is adequate jurisdiction. *Testa v. Katt*, 330 U.S. 86; *Martinez v. California*, 447 U.S. 277 at 284, note 5.

There is a considerable "overlap" of Article 78 review which embraces "due process" violations. *Ross v. Moore*, 502 F. Supp. 543 at 552 [9] also referred to at 553 [12].

CPLR 7806 states:

> "Any restitution or damages granted to the Petitioner must be incidental to the primary relief sought by the Petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the Supreme Court against the same body or *officer* in its or *his official capacity.*"

The Second Circuit states:

> "Where conduct of the supervisory authority is directly related to the denial of a constitutional right, it is not to be distinguished as a matter of causation upon whether it was action or inaction." *Duchesne v. Sugarman,* 566 Fed. 2d 817 at 832.

> "It is not necessary that the appellees directed any particular action with respect to these specific individuals, only that they affirmatively sanctioned the type of action which caused the violations." *Duchesne v. Sugarman,* 566 Fed 2d 817, 831 (2d Cir 1977). (Emphasis added.)

The Petitioner sued for damages from direct due process violations of the Fourteenth Amendment, and violations of U.S.C. Title *42,* Section 1985.

Petitioner in the reply affidavit and in his brief also requested the opportunity to amend to allege Section 1983 violations. (R128, paragraph 35.) Appendix (P 11 Brief Aug. 7, 1981.) In New York amended and supplemental pleadings and pleadings before or after judgment to conform to the evidence may be permitted.

Foman v. Davis, 371 U.S. 178, 182 and *Conley v. Gibson,* 355 U.S. 41 at 48 hold amendments should be freely granted.

> "There is a historic power of equity to award lost wages to workmen discriminated against. The statutory purpose leaves little room for the exercise of discretion not to order reimbursement." *Albermarle Paper Co. v. Moody,* 422 U.S. 405 at 416-417.

SEVENTH: Title 42 USC 1983 and 1985 ought not to be rendered meaningless. Nor should the Constitutional Oath, the Supremacy Clause, the Fourteenth Amendment due process and equal protection in the case of hearing officers. For a hearing officer to go back into such a situation or even enter into such a situation, without some form of declaratory relief where all of the respondents in Formal Pleadings have denied the relevancy of the Constitutional Oath they required of him leaves a situation where hearings are meaningless rituals, the thousands of hearings being reopened, can only be increased by more reopenings. The due process protection of a hearing officer who declines to preside at hearings controlled by the prosecution and is subsequently injured therefore, is of great importance. Otherwise hearings controlled by prosecutors will increase immensely.

The due process protections of the Fourteenth Amendment for the hearing officer bound by Constitutional Oath bound to follow the law of the land and Federal Court injunctions based on the Supremacy Clause in class actions are of great importance. Otherwise, there is official lawlessness. "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously." . . . If the government becomes a lawbreaker, it breeds contempt for law." *Olmstead v. U.S.,* 277 U.S. 438 at 485 Brandeis, J. (dissent).

1985 USC (2)

> "or if two or more persons conspire for the purpose of impeding, hindering or obstructing justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce . . ."

1985 USC (3)

> ". . . in any case set forth in this section, if one or more persons engaged therein do . . . whereby another . . . is injured . . . or deprived of having exercised . . . the right or privilege of a citizen of the United States the party so injured or deprived may have an action . . . recovery of damages . . . against any one or more."

Both emergency aid cases *Blum v. Bacon, Bacon v. Toia* later *sub nom. Blum v. Bacon,* also the rescheduled case (Cornell Legal Aid Briefs) *Swift v. Toia* later *sub nom. Swift v. Blum* had Federal Court injunctions against violations of the Supremacy Clause of the Constitution.

The Fourteenth Amendment requires that a Hearing Officer is protected from harm when

1) he faithfully observes the Oath, the Constitution, the Supremacy Clause, Federal Court decisions, and injunctions against violations of the Supremacy Clause *Stare Decisis* of the States highest Court,

2) when (a) he recuses at hearings prosecuted by his supervisor (b) he declines to preside at hearings where the outcome is controlled by the prosecution or the prosecuting division. That if a Hearing Officer is injured therefore, those injuring him under color of State custom or usage are liable to the Hearing Officer injured in an action at law, suit in equity or other proper proceeding for redress.

Under *Magna Carta*, the Constitution

I have asserted the Constitutional Oath, the Fourteenth Amendment and the Constitution, due process substance and procedure, the law of the land *i.e.*, supremacy clause and the duty to observe the law at every stage, and the injuries caused to the Hearing Officer or ALJ and to the little people when respondents forgot the oath and then denied the relevancy of the oath.

The small little children with school bank accounts, the denial and obstruction of the emergency AFDC aid, enjoined as violations of the Supremacy Clause, the illegal AFDC terminations and prorations, also enjoined for the 5 month unborn child and destitute mother, and the medically needy and their Constitutional rights were left in the dust.

Since *Nash v. California*, 613 F2d 10 and its progeny, there is growing alarm even in the Federal Government. Senate Committee on governmental affairs, Subcommittee on oversight of government are also concerned.

I faithfully observed the oath to the people, to support our Constitution, upheld the Courts, protected the Commissioners from contempt of court, and charges of biased hearings, and always recommendations according to the law and facts.

John Lord O'Brian instructed me for an hour in your building as best I can remember: Always be faithful to the oath, my duty would be first to 1) the people 2) our Constitution and laws 3) the Courts, then my clients, employers and all would be safe to show the Courts great respect, this was the greatest of the Courts.

In this Court only very important questions are considered, but the Court also had great power which it exercised with restraint.

Though without counsel, I prayed for guidance from the Providence referred to in the Constitution. Each step became more difficult but I have brought you the Constitutional Oath safe and intact. *Non est arctius viniculum inter homines quam jusjurandum.* Jenk Cent. p. 126 Case 54.

I am exhausted and will not be able to afford or do more records.*

I also know it is not seemly to argue one's case in person.

Perhaps this Court's clerk may informally request the Record on Appeal and the original record, grant certiorari and reverse, deny certiorari or if the question is important request some special government attorney general or some bar association or lawyer *amicus curiae* to argue the case.

I require the Writ of Certiorari because the Court of Appeals held there is no substantial constitutional question involved on the severed final judgment or on the final dismissals of severed claims for relief, *all* under the Fourteenth Amendment and 42 USC 1983 and 1985(b)(c).

Conclusion

I pray for a Writ of Certiorari and ask for a reversal.

Respectfully submitted,

L. ROBERT LEISNER, ESQ.
Petitioner Pro Se
1 Arundel Road
Buffalo, New York 14216

* 1. Wife, eye surgery, November 7, 1984.
2. Father, WWI Vet. 91, ill.

Certification

I, L. Robert Leisner, hereby certify that I am a member in good standing in the bar of the United States Supreme Court having been admitted on March 1, 1966.

L. ROBERT LEISNER

DATED: November 9, 1984

APPENDIX "A"

Order of the New York Court of Appeals Dated March 22, 1984 Dismissal. (No substantial constitutional question directly involved on appeal from remaining portions of the Appellate Division Order Leaves Final Judgment Affirmed.

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of March A. D. 1984.

Present, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

—0—

3 Mo. No. 292 SSD 33.

In the Matter of
L. ROBERT LEISNER,

Appellant,

vs.

VICTOR S. BAHOU, as President of the New York State Civil Service Commission, *et al.*,

Respondents.

—0—

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

Appendix "A"—Order of the New York Court of Appeals Dated March 22, 1984 Dismissal.

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the order of the Appellate Division appealed from, insofar as it pertains to vacatur of the stipulation of settlement and the claim for damages against respondent Bonk, does not finally determine the proceeding within the meaning of the Constitution, and upon the further grounds that no substantial constitutional question is directly involved on the appeal from the remaining portions of the Appellate Division order, and appellant is not aggrieved by the modification at the Appellate Division.

DONALD M. SHERAW
Clerk of the Court

(Denied lv. to appeal 6/14/84, see next page.)

APPENDIX "B"

Order of the State of New York Court of Appeals Dated June 14, 1984 Denying Leave to Appeal.

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of June A. D. 1984.

Present. HON. LAWRENCE H. COOKE.
Chief Judge, presiding.

—0—

3 Mo. No. 528.

In the Matter of
L. ROBERT LEISNER,

Appellant,

vs.

VICTOR S. BAHOU, as President of the New York State Civil Service Commission, *et al.*,

Respondents,

PETER MULLANY, *et al.*,

Defendants.

—0—

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

Appendix "B"—Order of the State of New York Court of Appeals Dated June 14, 1984 Denying Leave to Appeal.

ORDERED, that the said motion, insofar as it seeks leave to appeal from those portions of the order of the Appellate Division which pertain to vacatur of the stipulation of settlement and the claim for damages against respondent Bonk, be and the same hereby is dismissed upon the ground that those portions of the order do not finally determine the proceeding within the meaning of the Constitution: and it is

ORDERED, that the said motion, insofar as it seeks leave to appeal otherwise, be and the same hereby is denied: and it is

ORDERED, that the said motion for stay be and the same hereby is dismissed as academic.

KATHRYN C. BROWN
Clerk of the Court

APPENDIX "C"

Order of the State of New York Supreme Court, Appellate Division, Third Department Dated and Entered on November 9, 1983. (Affirming severed final judgment on Article 78 and affirming severed final order of dismissals of actions under the Fourteenth Amendment and Title 42 U.S.C. Section 1983 and 1985 reinstates severed action against William Bonk Director of Personnel Agriculture and Markets Section 106 Civil Service Laws and Motion to Void Stipulation.)

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, in the City of Albany, New York, commencing on the 1st day of September, 1983.

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
HON. LEONARD A. WEISS,
HON. HOWARD A. LEVINE,
Associate Justices.

———0———

Appendix "C"—Order of the State of New York Supreme Court, Appellate Division, Third Department Dated and Entered on November 9, 1983.

L. ROBERT LEISNER,

Petitioner-Appellant.

against

VICTOR S. BAHOU, as President of the New York State Civil Service Commission, BARBARA BLUM, as Commissioner of the New York State Department of Social Services, EDWARD REGAN, Comptroller, State of New York.

Respondents.

and

PETER MULLANY, individually and as Assistant Counsel, New York State Department of Social Services, THOMAS G. CONWAY, individually and as Counsel, New York State Department of Agriculture and Markets, WILLIAM BONK, individually and as Director of Personnel, New York State Department of Agriculture and Markets, J. ROGER BARBER and JAMES GARLICK, as Commissioners, New York State Department of Agriculture and Markets,

Defendants.

44185.

Albany County Clerk's Index No. 11672-81.

———0———

The petitioner-appellant having appealed from an order of the Supreme Court at Special Term (KLEIN, J.), entered on December 9, 1981, in the office of the Clerk of

Appendix "C"—Order of the State of New York Supreme Court, Appellate Division, Third Department Dated and Entered on November 9, 1983.

Albany County, which, *inter alia*, in a proceeding pursuant to CPLR Article 78, dismissed, and severed certain of petitioner's claims, and from a judgment of said Court (TORRACA, J.), entered on June 24, 1982, in the office of the Clerk of Albany County, which denied the remaining claim in petitioner's application pursuant to CPLR Article 78 to annul a determination of the Civil Service Commission which upheld a performance rating of unsatisfactory, and, said appeals having been presented during the above-stated term of this Court, and having been argued by L. Robert Leisner, petitioner-appellant, *pro se*, and by Carl E. Stephan, Assistant Attorney General, of counsel for respondents, and after due deliberation, the Court having rendered a decision on the 3rd day of November, 1983, it is hereby

ORDERED, that the order be and the same hereby is modified, on the law, by (1) reversing so much thereof as dismissed the cause of action against William Bonk, Director of Personnel of the Department of Agriculture and Markets, under section 106 of the Civil Service Law, and said cause of action is converted into an action at law; and (2) reversing that portion of the order which severed the cause of action to vacate the stipulation of settlement and directed that it be tried in a separate plenary trial, said cause of action is converted to a motion to vacate the stipulation and remitted to Special Term; and as so modified, is affirmed, without costs, and it is further

Appendix "C"—Order of the State of New York Supreme Court, Appellate Division, Third Department Dated and Entered on November 9, 1983.

ORDERED, that the judgment be and the same hereby is affirmed, without costs.

ENTER:

/s/ MICHAEL J. NOVACK
Clerk

DATED AND ENTERED: November 9, 1983

A TRUE COPY
Michael J. Novack
Clerk

APPENDIX "D"

Opinion of the New York State Supreme Court, Appellate Division, Third Department, Dated November 3, 1983.

STATE OF NEW YORK
SUPREME COURT
Appellate Division—Third Judicial Department

———0———

November 3, 1983 44185

In the Matter
of
L. ROBERT LEISNER,

Appellant,

v.

VICTOR S. BAHOU, as President of the New York State Civil Service Commission, *et al.*,

Respondents.

———0———

Appeals (1) from an order of the Supreme Court at Special Term (Klein, J.), entered December 9, 1981 in Albany County, which, *inter alia*, in a proceeding pursuant to CPLR article 78, dismissed and severed certain of petitioner's claims, and (2) from a judgment of said court (Torraca, J.), entered June 24, 1982 in Albany County, which denied the remaining claim in petitioner's application pursuant to CPLR article 78 to annul a determination of the Civil Service Commission which upheld a performance rating of unsatisfactory.

Following unsatisfactory reports evaluating his service during 1978 as a probationary hearing officer for the

Appendix "D"—Opinion of the New York State Supreme Court, Appellate Division, Third Department, Dated November 3, 1983.

Department of Social Services, petitioner was notified of his termination effective January 17, 1979. Upon learning that he had become permanent through expiration of his probationary period, he commenced a CPLR article 78 proceeding to prevent his discharge. A written stipulation of settlement was made whereby petitioner agreed to resign effective June 29, 1979 "in consideration of the opportunity to seek employment in another agency". In the meantime, petitioner challenged the unsatisfactory rating he received for 1978 by appealing to the Performance Rating Board, which dismissed his claim. He then appealed to the Civil Service Commission. That appeal consisted of an interview of petitioner and one of the supervisors who gave him the unsatisfactory rating. The commission adopted the recommendation of the interviewer to dismiss the appeal on the ground that petitioner's work had been unsatisfactory. He then commenced the instant CPLR article 78 proceeding seeking a judgment annulling the commission's determination; a judgment annulling the stipulation settling the prior article 78 proceedings, an award of money damages; a declaration that the hearing procedures of the Department of Agriculture and Markets, where he formerly worked, denied the public equal protection of law; and, a declaration that hearing officers' "integrities of findings of fact and law are protected". Special Term (Klein, J.) dismissed the claim for monetary relief and the claim questioning the hearing procedures, severed the claim to vacate the stipulation and directed petitioner to initiate a separate plenary action, and further ordered respondents to answer the remaining claim seeking review of the

determination to discharge. Following the answer, Special Term (Torraca, J.) dismissed the remaining claim. Petitioner has appealed both the initial order and the judgment.

Initially, we note that petitioner's causes of action seeking monetary damages for alleged violations of section 1985 of title 42 of the United States Code, the Fourteenth Amendment, and section 106 of the Civil Service Law are all independent causes of action not incidental to the primary relief of annulling the determination of the Civil Service Commission. As such, damages may not be awarded in this proceeding (CPLR 7806). Moreover, claims against the State and its officers based upon acts in their official capacity must be brought in the Court of Claims (Court of Claims Act, §9). To the extent that the claims are brought against the officers in their individual capacity, we find that the petition fails to sufficiently particularize the transactions or occurrences to be proven and the material elements of a cause of action pursuant to either section 1985 of title 42 of the United States Code or the Fourteenth Amendment (see CPLR 3013; see, also, *Foley v. D'Agostino*, 21 AD2d 60).

However, with respect to section 106 of the Civil Service Law, petitioner alleged that the director of personnel from the Department of Agriculture and Markets, William Bonk, gave out false information regarding the conditions of petitioner's departure from the department which effectively destroyed his employment opportunities during the years 1979-1980. Giving petitioner the benefit of every favorable inference (see *Matter of Cutcher v. Nyquist*, 39 AD2d 810, 811), we

find that the allegations sufficiently establish a claim under section 106. However, damages against an officer in his individual capacity cannot be recovered in a CPLR article 78 proceeding (8 Weinstein-Korn-Miller, NY Civ Prac, par 7806.01). Inasmuch as jurisdiction has been obtained over the parties, we exercise our authority to convert this portion of the instant proceeding into an action at law and remit the matter to Special Term (see CPLR 103, subd [c]; *Matter of Adams v. New York State Civ. Serv. Comm.*, 51 AD2d 668).

Both causes of action seeking declaratory relief concerning the hearing procedures in the Department of Agriculture and Markets and the integrity of hearing officers were properly dismissed. Since petitioner is no longer employed as a hearing officer, he lacks standing. Nor can we discern any justiciable controversy in this respect.

We next find that Special Term was in error in ordering severance of that cause of action seeking to annul the stipulation of settlement and directing petitioner to commence a separate suit in that its reliance upon *Yonkers Fur Dressing Co. v. Royal Ins. Co.* (247 NY 435) is misplaced. The rule has been modified by *Teitelbaum Holdings v. Gold* (48 NY2d 51) which held that absent direct proof of an express stipulation of discontinuance or entry of a judgment upon a stipulation of settlement, it will be presumed that the action is not terminated. Here, there is neither a judgment nor proof in this record that the initial CPLR article 78 proceeding was unequivocally terminated; hence, it may not be presumed that it was. Indeed, it is reasonable to conclude that it was executory. Therefore, petitioner's

cause of action to annul the stipulation should be converted into a motion and remitted to Special Term for determination, with the option that an evidentiary hearing be conducted upon any unsettled factual questions. The ease and simplicity of a motion rather than a new and separate plenary action is preferable and consonant with the holding in *Teitelbaum Holdings v. Gold* (48 NY2d 51, *supra*). Nor does this record contain sufficient evidence to support respondents' claim that petitioner should be barred by the defense of laches.

Finally, in our consideration of the Civil Service Commission's determination upholding the "unsatisfactory" performance rating for 1978, judicial inquiry is limited to whether that determination has a rational basis in the record (*Matter of Burke v. Axelrod*, 90 AD2d 577). Special Term concluded that the various reports and evaluations of petitioner's work performance were "thorough and sincere" and thus presented a rational basis for the commission's determination. We concur. Petitioner relies upon a memorandum from the Director of Personnel Services and Development Division to demonstrate that the agency violated its own rules in making the challenged rating. That memorandum, directed to all personnel officers, specifically required appropriate documentation of a rating evaluation, including "evidence of periodic counseling * * * or some indication that the employee was advised that his or her performance could lead to an annual rating of unsatisfactory". We conclude that respondents have complied with this memorandum, which plainly related to internal management and is binding on the agency (see NY Const, art IV, §8; *Matter of Johnson v. Smith*, 83

Appendix "D"—Opinion of the New York State Supreme Court, Appellate Division, Third Department, Dated November 3, 1983.

AD2d 721, 722). Review of the record establishes that after petitioner's October rating, a second probation period was required and supervision was shifted from Syracuse to Albany with the designation of a new supervisor and rater to provide closer supervision. The new supervisor explained that the reassignment was occasioned by his unsatisfactory performance, which he had discussed with petitioner in great detail on numerous occasions. The record confirms, at the very least, that petitioner was accorded "periodic counseling * * * or some indication" that his performance was inadequate as required by the rating memorandum. Accordingly, we find that the record contains ample basis for the commission's determination upholding petitioner's unsatisfactory rating for the year 1978, and that part of the judgment dismissing the petition must be affirmed.

Order modified, on the law, by (1) reversing so much thereof as dismissed the cause of action against William Bonk, Director of Personnel of Agriculture and Markets, under section 106 of the Civil Service Law, and said cause of action is converted into an action at law; and (2) reversing that portion of the order which severed the cause of action to vacate the stipulation of settlement and directed that it be tried in a separate plenary trial, said cause of action is converted to a motion to vacate the stipulation and remitted to Special Term; and, as so modified, affirmed, without costs.

Judgment affirmed, without costs.

MAHONEY, P.J., MAIN, MIKOLL, WEISS and LEVINE, JJ., concur.

APPENDIX "E"

Order of the Supreme Court Judge Klein, Albany County, New York Dated November 30, 1981. (Allows Article 78 to proceed, severs and dismisses all claims for violations of the Fourteenth Amendment, Title 42 U.S.C. 1985 and 1983 and claims for damages and declaratory relief severs and dismisses motion to set aside void stipulation of prior Article 78 made "in consideration of the opportunity to seek employment with another agency.")

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany at the Albany County Court House, Albany, New York on the 7th day of August, 1981.

PRESENT:

HONORABLE AARON E. KLEIN,
Justice Presiding.

———0———

Appendix "E"—Order of the Supreme Court Judge Klein, Albany County, New York Dated November 30, 1981.

L. ROBERT LEISNER,

Petitioner.

against

VICTOR S. BAHOU, as President of The New York State Civil Service Commission,

Respondent.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Respondent.

EDWARD REGAN, Comptroller, State of New York,

Respondent.

PETER MULLANY, individually and as Assistant Counsel New York State Department of Social Services,

THOMAS G. CONWAY, individually and as Counsel New York State Department of Agriculture and Markets,

Defendant.

WILLIAM BONK, individually and as Director of Personnel New York State Agriculture and Markets,

Defendant.

J. ROGER BARBER and JAMES GARLICK as Commissioners New York State of Agriculture and Markets,

Defendants.

Index No. (illegible).

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Upon reading and filing the *pro se* petition verified June 30, 1981, the amended petition verified July 27, 1981, the reply affidavit sworn to August 5, 1981 and

Appendix "E"—Order of the Supreme Court Judge Klein, Albany County, New York Dated November 30, 1981.

record of petitioner's appeal of his performance rating submitted by petitioner, and the motion to dismiss and supporting affidavit sworn to July 30, 1981 filed on behalf of the respondents and defendants by the Honorable Robert Abrams, Attorney General of the State of New York (Ellen Lacy Messina, Assistant Attorney General, of counsel), and oral argument having been heard on August 7, 1981, and after due deliberation a decision dated October 28, 1981 having been rendered by the Honorable Aaron E. Klein, it is hereby

ORDERED that the claims for monetary relief against the State of New York and its agents, the claims questioning the hearing procedures in the Department of Agriculture and Markets and the claim concerning the integrity of hearing officers are severed and dismissed, and it is further

ORDERED that the claim seeking to vacate the March, 1979 stipulation be severed and that petitioner initiate a separate plenary action to vacate such stipulation, and it is further

ORDERED that respondents shall answer the remaining claim within ten days from service of this order and that petitioner may renotice the matter for a hearing upon two days' notice.

Dated: November 30, 1981
Kingston, New York

ENTER

s/ AARON E. KLEIN
J. S. C.

APPENDIX "F"

Decision of the Supreme Court Justice Klein, Albany County, New York Dated October 28, 1981.

STATE OF NEW YORK

SUPREME COURT—County of Albany

———0———

L. ROBERT LEISNER,

Petitioner.

vs.

VICTOR S. BAHOU, as President of The New York State Civil Service Commission,

Respondent, et al.

———0———

Albany County Special Term, August 7th, 1981
Motion No. 34

(Justice Aaron E. Klein, Presiding)

APPEARANCES:

L. ROBERT LEISNER, Esq.
Petitioner Pro Se
1 Arundel Road
Buffalo, New York 14216

HON. ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Respondents/Defendants
The Capitol
Albany, New York 12224
(ELLEN LACY MESSINA, *of Counsel*)

KLEIN, *J.*

Appendix "F"—Decision of the Supreme Court Justice Klein, Albany County, New York Dated October 28, 1981.

In this CPLR Article 78 proceeding, the petitioner seeks an order annulling a determination of the respondent, Civil Service Commission, dated February 26, 1981, which rejected his appeal of a 1978 performance rating of unsatisfactory, an order of this court annulling a stipulation made between the petitioner and the respondent, Civil Service Commission in March of 1979, an order restoring petitioner's Civil Service rights and pay from June 30, 1979, and granting judgment against the respondents/defendants, and for the plaintiff in the amount of $700,000. Additionally, the petitioner seeks a judgment declaring the hearing procedures in the Department of Agriculture and Markets in violation of the equal protection clause and a "judgment declaring the lawful protection accorded to the integrity of the hearing officer."

The application before the court is a motion to dismiss on objections in point of law. (CPLR 7804[f].)

At the outset it must be noted by the court that the petition in this matter in what might loosely be characterized as a free association narrative, describes various happenings to the petitioner who was a New York State Hearing Officer (Administrative Law Judge) and resigned from service effective June 30th, 1979, apparently as part of a stipulation made between petitioner and the New York State Civil Service Commission, which occurred after the petitioner had previously commenced an Article 78 proceeding.

It has been consistently held that on a motion to dismiss an Article 78 proceeding on objections in point of law "... 'only the petition may be considered and all

Appendix "F"—Decision of the Supreme Court Justice Klein, Albany County, New York Dated October 28, 1981.

of its allegations are deemed to be true' (*Matter of Cutcher v. Nyquist*, 39 AD2d 810, 811. See, also, *Matter of Board of Educ. of City School Dist. of City of Mount Vernon v. Allen*, 32 AD2d 985; 24 Carmody-Wait 2d, NY Practice, §145:315)." *Mattioli v. Leland Casscles*, 50 AD2d 1013. The first portion of the petition concerns itself with the unsatisfactory performance rating which the petitioner received, and ultimately resulted in the determination of the respondent Bahou dated February 26, 1981, which dismissed his appeal. Giving the petitioner all favorable inferences to be drawn from it, it appears to this court that the petitioner has presented an argument supported by documents that this rating was erroneous. In *Matter of Douglas v. Miller*, 55 Misc. 2d 303, affd 31 AD2d 889, the court found that judicial review may be had of unsatisfactory performance ratings.

Accordingly, this court will deny so much of the objections as seek to dismiss that portion of the petition.

The claims made for monetary relief against the State of New York and its agents, will be dismissed since it is obvious to this court that the claim being made against the State of New York, and its officials acting in their official capacity, cannot be made in this forum, and must be brought by an action in the Court of Claims. (*Cf. New York State Thruway Authority v. Hurd*, 29 AD2d 157; *Psaty v. Duryea*, 306 NY 413; *Breen v. Mortgage Comm. of State of New York*, 285 NY 435; *Matter of Dormitory Authority* [*Span Elec. Corp.*], 18 NY2d 114, 118; *Adler, Inc. v. Noyes*, 285 NY 34.)

Appendix "F"—Decision of the Supreme Court Justice Klein, Albany County, New York Dated October 28, 1981.

The claims made in the petition, questioning the hearing procedures in the Department of Agriculture and Markets, and the integrity of hearing officers, will be dismissed since the petitioner has no standing, at this juncture, to question those procedures, and more importantly, he has not presented a justiciable controversy which is required under CPLR §3001. (See generally, 3 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶3001.01; *et seq.*)

The court will direct severance of the claim made in the petition to vacate the stipulation which the petitioner entered into in March of 1979. The court has reviewed all submissions on this application and cannot find a copy of the stipulation nor any pleadings in the prior CPLR Article 78 proceeding. It is, therefore, the opinion of this court that the prior action has been terminated, and the petitioner should seek to vacate such stipulation in a separate plenary trial. (See *Teitelbaum Holdings Ltd. v. Gold*, 48 NY2d 51; 2 Carmody Wait 2d §§7:15, *et seq.*)

In passing, the court notes that it would appear that the procedures for reviewing the performance rating of the petitioner are not constitutionally infirm, and meet the requirements of procedural due process. (See *Woods v. State of New York*, 469 F. Supp. 1127, affd without opinion 614 F2d 1293.)

The attorney for the respondents is to submit an order granting its application insofar as dismissing from the petition the claims seeking a money judgment, and those seeking a declaratory judgment concerning the hearing procedures in the Department of Agriculture and Markets and the integrity of the hearing officer. The

Appendix "F"—Decision of the Supreme Court Justice Klein, Albany County, New York Dated October 28, 1981.

order shall also provide for severance (CPLR 407) of the foregoing claims which have been dismissed, and the claim seeking to vacate the stipulation made in March of 1979. Additionally, the order shall provide for ten (10) days within which the respondents are to answer the claim remaining in the petition in the Article 78 proceeding, with a provision directing the petitioner to renotice the matter for a hearing upon two days notice. (CPLR 7804[g].)

Dated: Kingston, New York
October 28th, 1981

AARON E. KLEIN
J. S. C.

APPENDIX "G"

Judgment of the Supreme Court Justice Torraca, Albany County Dated June 22, 1982. (Denies petition in severed Article 78, asserting violations of due process, Fourteenth Amendment, Title 42 U.S.C. 1985 and 1983.)

STATE OF NEW YORK
SUPREME COURT—County of Albany

—0—

L. ROBERT LEISNER,

Petitioner,

VICTOR S. BAHOU, as President of the New York State Civil Service Commission,

Respondent,

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Respondent,

EDWARD REGAN, as Comptroller, State of New York,

Respondent,

PETER MULLANY, individually and as Assistant Counsel New York State Department of Social Services,

THOMAS G. CONWAY, individually and as Counsel, New York State Department of Argiculture and Markets,

Defendant,

WILLIAM BONK, individually and as Director of Personnel, New York State Agriculture and Markets,

Defendant,

J. ROGER BARBER and JAMES GARLICK as Commissioners, New York State Agriculture and Markets,

Defendants.

Appendix "G"—Judgment of the Supreme Court Justice Torraca, Albany County Dated June 22, 1982.

Index No. 11672-81

—0—

Upon reading and filing the *pro se* petition verified June 30, 1981, the amended petition verified July 27, 1981, the reply affidavit sworn to August 5, 1981, the record of petitioner's appeal of his performance rating submitted by petitioner on August 7, 1981, the reply sworn to March 20, 1982, the petitioner's supplemental reply affirmed April 12, 1982, and the verified answer and supporting affidavit sworn to December 28, 1981, filed on behalf of the respondents by the Honorable Robert Abrams, Attorney General of the State of New York (Ellen Lacy Messina, of Counsel), and an oral argument by the attorneys for the parties having been had, and due deliberation having been had thereon, and a decision having been rendered on May 27, 1982 by the Honorable Joseph P. Torraca, it is hereby

ORDERED, ADJUDGED AND DECREED that the petition is denied in accordance with the decision attached hereto and made a part hereof.

Dated: June 22, 1982, Kingston, N. Y.

ENTER

s/ JOSEPH P. TORRACA
J. S. C.

APPENDIX "H"

Decision of the Supreme Court Justice Torraca, Albany County Dated May 27, 1982 for severed Article 78.

SUPREME COURT OF THE STATE OF NEW YORK

County of Albany

———0———

L. ROBERT LEISNER,

Petitioner,

vs.

VICTOR S. BAHOU, as President of The New York State Civil Service Commission,

Respondent, et al.

———0———

Albany County Special Term, April 2, 1982, Motion Number 29

(JUSTICE JOSEPH P. TORRACA, PRESIDING)

APPEARANCES:

L. Robert Leisner, *Petitioner Pro Se*, 1 Arundel Road, Buffalo, New York 14216.

Robert Abrams, Attorney General of the State of New York, The Capitol, Albany, New York 12224 (Ellen Lacy Messina, Assistant Attorney General, *of counsel*) *for the Respondents/Defendants.*

TORRACA, *J.*

L. Robert Leisner was employed as a Hearing Officer by the New York State Department of Social Services. He received an "unsatisfactory" performance rating for

1978 which he appealed to the Department of Social Services Rating Board. This appeal was denied and he then appealed to the Civil Service Commission, which likewise rendered an adverse determination.

Petitioner then initiated this Article 78 proceeding. His amended petition requests a judgment; (1) annulling the action of the Civil Service Commission; (2) annulling the stipulation of settlement made in March, 1979 and fully restoring petitioner's Civil Service rights and pay since June 30, 1979; (3) granting damages to petitioner in the amount of $700,000, together with costs, fees and disbursements; (4) declaring that the hearing procedures of the Agriculture and Markets deny New York citizens equal protection of the law; and (5) protecting the "Fair Hearing" officer's integrity and findings of fact and law.

The Attorney General of the State of New York made a motion addressed to such petition requesting dismissal of Mr. Leisner's petition. By order of this court per Justice Aaron E. Klein dated November 30, 1981, all of the causes of action in Mr. Leisner's petition were dismissed with the exception of his request for judgment annulling the action of the Civil Service Commission. It is to that impetration that the court now addresses itself.

The well established rule to be applied here is that the courts cannot interfere with the administrative decisions made in the exercise of discretion, unless they are arbitrary and unreasonable and constitute an abuse of discretion. More specifically, such decisions are not to be interfered with unless no rational basis can be found for the exercise of discretion (*Matter of Pell v. Board of*

Appendix "H"—Decision of the Supreme Court Justice Torraca, Albany County Dated May 27, 1982.

Education, 34 N Y 2d 222; *Matter of Banko v. Bahou*, 69 A D 2d 933; *Matter of LaFontaine v. New York State Dept. of Civil Service*, 56 A D 2d 974).

The extensive documents, reports and reviews submitted by the respondent indicates that a thorough and sincere review and evaluation was made of petitioner's performance. The factual findings and determinations and the accompanying testimony presents a rational basis for respondent's determination that petitioner's performance was unsatisfactory. Accordingly, the petition is denied.

Submit order.

Dated: Kingston, New York
May 27, 1982

(Order to be submitted by Attorney General)

APPENDIX "I"

Statutes Involved

TITLE 42 THE PUBLIC HEALTH AND WELFARE

Chapter 21—Civil Rights

42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. §1979.

42 U.S.C. §1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him,

or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or

deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. §1980.

NEW YORK STATE CIVIL SERVICE LAW

§106. Misdemeanor to obstruct civil service rights; false representation; impersonation in examination

Any commissioner, or examiner, or any other person who shall wilfully, by himself or in cooperation with other persons, defeat, deceive or obstruct any person in respect of his or her right of examination, registration, certification, appointment, promotion or reinstatement, pursuant to the provisions of this chapter or the rules or regulations established thereunder or who shall wilfully and falsely mark, grade, estimate or report upon the examination or proper standing of any person examined, registered or certified pursuant to the provisions of this chapter, or aid in so doing, or who shall wilfully make any false representations concerning the same, or concerning the person examined, or who shall wilfully furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined, registered or certified, or to be examined, registered or certified, or who shall impersonate any other person, or permit or aid in any manner any other person to impersonate him, in connection with any examination, registration or application or request to be examined or registered, shall for each offense be deemed guilty of a misdemeanor.

L.1958, c. 790, §1.

Appendix "I"—Statutes Involved.

New York CPLR 103 subdivision C provides:

> If a Court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the Court shall make whatever order is required for its proper prosecution.

New York CPLR 7804(e) and (f) states:

> (e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact. The court may order the body or officer to supply any defect or omission in the answer, transcript or an answering affidavit. Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted.
>
> (f) Objections in point of law. The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just; and unless the order specifies

otherwise, such answer shall be served and filed within five days after service of the order with notice of entry. The petitioner may re-notice the matter for hearing upon two days' notice. The petitioner may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or renoticed to be heard.

New York CPLR 7806 states:

"Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the Supreme Court against the same body or *officer* in its or *his official capacity.*"

APPENDIX "J"

Partial Judgment and Order Dated December 12, 1978, Entered December 15, 1978
(In a class action)

UNITED STATES DISTRICT COURT
Southern District of New York

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77 Civ. 2425 HFW

JOANNE SWIFT, individually and on behalf of her Minor Daughter, MICHELLE SWIFT, and on behalf of all other persons similarly situated,

Plaintiffs,

LYLIA ROE,

Plaintiff-Intervenor,

against

PHILIP L. TOIA, individually and as Commissioner of the New York State Department of Social Services; CHARLES W. BATES, individually and as Commissioner of the Westchester County Department of Social Services; JOHN BATTISTONI, individually and as Acting Commissioner of the DUTCHESS County Department of Social Services; and GABRIEL T. RUSSO, individually and as Commissioner of the Monroe County Department of Social Services,

Defendants.

Plaintiff Joanne Swift having commenced the above entitled action pursuant to 42 U.S.C. §1983 on behalf of herself, her minor daughter, and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure, and the Court, by order dated May 1, 1978, and entered May 3, 1978, (1) having denied

Appendix "J"—Partial Judgment and Order Dated December 12, 1978, Entered December 15, 1978.

defendants' motion for judgment on the pleadings, (2) having granted plaintiffs' motion for leave to file an amended complaint, (3) having granted Lylia Roe's motion to intervene as a party plaintiff and add a party defendant, and (4) having denied plaintiffs' motion for a class action order without prejudice to renewal of the motion for a class action order, and plaintiffs having renewed their motion for a class action order, and the Court, by order dated and entered on June 20, 1978, having granted plaintiffs' motion for a class action order, and the plaintiffs having moved for partial summary judgment for the declaratory and injunctive relief prayed for in the amended complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having rendered an opinion dated November 30, 1978, determining that plaintiffs' motion for partial summary judgment should be granted, it is hereby

ORDERED (1) that the above-entitled action is maintainable as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure and that the class consists of all persons who are residents of the State of New York, who are, were, or will be recipients of Aid to Families with Dependent Children assistance ("AFDC") and whose grants have been, are being, or are threatened to be reduced, modified or suspended pursuant to defendants' policy of prorating the public assistance grant when an individual, who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs, resides with an AFDC family consisting of a parent or caretaker relative and at least one needy child; and it is further

Appendix "J"—Partial Judgment and Order Dated December 12, 1978, Entered December 15, 1978.

ORDERED (2) that plaintiffs' motion for partial summary judgment for the declaratory and injunctive relief prayed for in the complaint be and hereby is granted; and it is further

ADJUDGED AND DECREED (3) that plaintiffs are entitled to and are hereby granted a declaratory judgment declaring that defendants' reduction, modification or suspension of AFDC grants pursuant to their policy of prorating the AFDC grant when an individual, who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs, resides with an AFDC family consisting of a parent or caretaker relative and at least one needy child, without determining whether the non-legally responsible individual is contributing to the AFDC household or whether his or her presence creates a reduced need for the AFDC household, violates the federal Social Security Act, 42 U.S.C. §601 *et seq.*, and the regulations promulgated thereunder by the United States Department of Health, Education and Welfare, particularly 45 C.F.R. §233.20 and 233.90, and the Supremacy Clause of Article VI of the United States Constitution; and it is further

ORDERED, ADJUDGED AND DECREED (4) that defendants, their officers, agents, employees, successors and all parties in active concert and participation with them be and hereby are permanently enjoined from enforcing their policy of prorating AFDC grants when an individual, who has no legal obligation to support the AFDC family and who receives non-welfare income sufficient to meet his or her needs, resides with an AFDC family consisting of a parent or caretaker relative and at least one needy child, without determining

Appendix "J"—Partial Judgment and Order Dated December 12, 1978, Entered December 15, 1978.

whether and in what amount the non-legally responsible individual is contributing to the AFDC household, or whether and in what amount his or her presence creates a reduced need for the AFDC household, and it is further

ORDERED, ADJUDGED AND DECREED (5) that defendants, their officers, agents, employees, successors and all persons in active concert and participation with them be and are permanently enjoined from reducing, suspending or modifying any AFDC grant because of the presence of a non-legally responsible person, who receives sufficient non-welfare income to meet his or her needs, in the home of an AFDC family consisting of a parent or caretaker relative and at least one needy child; except in an amount reflecting a determination by defendants of (1) the actual amount of contributions, if any, that the AFDC household receives from the non-legally responsible person who resides in the AFDC household, or (2) the actual amount of decreased need, if any, of the AFDC household, resulting from the presence of the non-legally responsible person; and it is further

ORDERED, ADJUDGED, AND DECREED (6) that defendants provide written notification of this judgment to each of the local offices of the Department of Social Services within fourteen (14) days of the date of entry of this judgment.

/s/ HENRY F. WERKER
Henry F. Werker MA

DATED: December 12, 1978
New York, New York

Judgment Entered 12/15/78
/s/ Raymond F. Burghardt
Clerk

APPENDIX "K"

Petitioner's Reply to Respondent's Answer

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

—0—

L. ROBERT LEISNER,

Petitioner,

VICTOR S. BAHOU, as President of the New York State Civil Service Commission,

Respondent,

et al.

Index No. 11672-81.

—0—

PETITIONER REPLYING TO THE RESPONDENT'S VERIFIED ANSWER, SAYS:

1. Petitioner denies the affirmative allegations in paragraph "Sixth". Petitioner also asserts the delay was a denial.

2. Petitioner denies knowledge or information sufficient to form a belief as to each and every part of the affirmative allegations in paragraph "Eleventh". The Cimorelli rating No. 1 and the Cornell Briefs and the show cause order were omitted. The standards were ignored.

3. Petitioner admits so much of paragraph "Fourteenth" as affirmatively alleges that due process requires a fair hearing before an impartial person.

Appendix "K"—Petitioner's Reply to Respondent's Answer.

Petitioner further alleges that under the constitution the hearing officers must be legally constituted and agency practice requires a lawyer hearing officer.

4. Petitioner denies the affirmative allegation in paragraph "Fifteenth" in that it ignores the text of the regulation.

5 Petitioner admits the truth of the affirmative allegation contained in paragraph "Sixteenth" but denies that the Commission has been consistent on the privilege of reinstatement. The Civil Service Department used the rating as a bar to reinstatement.

6. To the respondent's affirmative allegation "seventeenth" petitioner replies that the allegations of petitioner's amended petition (amended July 29, 1981 as of right) namely allegations 4 and 5 remain, the allegations 42 through 55 inclusive, 56 through 59 inclusive remain in support of petitioner's demand (page 29 amended petition) "for judgment against the respondents' ".

1. Annuling the action of the Civil Service Commission.

PETITIONER FURTHER REPLYING TO THE RESPONDENTS ANSWER AND REPLYING TO THE AFFIRMATIVE DEFENSES, PETITIONER:

7. Denies the first defense and allegations contained in paragraphs "eighteenth" and "nineteenth".

8. Denies the second defense and allegation contained in paragraph "Twentieth". Due process requires some substance and does not countenance delays, bad faith,

Appendix "K"—Petitioner's Reply to Respondent's Answer.

aborted appeals, omitted and concealed papers and totally ignoring the law and oaths and duties and rights of the hearing officer.

9. Denies the third defense and the allegations of paragraph "twenty-second".

10. Denies the fourth defense and the allegation of paragraph "twenty-third". Annexed hereto and made a part hereof is a reply affidavit to the Joseph R. Healey affidavit.

11. Petitioner specifically, specially and separately invokes Article 5, Section 6 and Section 7 of the New York State Constitution, Section 106 of the New York State Civil Service Law, and the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Petitioner on all the proceedings herein renews his request for relief as originally prayed for in his petition amended of course and petition brought to the Court on August 7, 1981 together with costs and disbursements and such other and further relief as may be just and proper.

L. ROBERT LEISNER
L. ROBERT LEISNER
1 Arundel Road
Buffalo, New York 14216
TEL: (716) 838-2393
(716) 284-8831

TO: ATTORNEY GENERAL
State of New York
Albany, New York

* * *

APPENDIX "L"

Petitioner's Reply to Joseph R. Healy Affidavit

* * *

51. Where there is an abuse of power and a flagrant invasion of rights which officials have attempted to cover up and conceal, the courts by law condemn administrative action. A commission's administrative actions have been limited in Anglo American Law from *Rookes Case 1598* 5 Co. Rep. 99 b. Coke's report:

> "and notwithstanding the words of the commission give authority to the Commissioners to do according to their discretions, yet their proceedings ought to be limited within the rule and reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretenses, and not to do according to their wills and private affections, for as one saith, 'talis discretio discretionerm confundit'." (Reciting the Latin of the *Roman Law*.)

52. It is clearly beyond the scope and power of an administrative agency to punish a Hearing Officer bound by oath and further bound by the lawyer's oath for following the statutes and the Court of Appeals.

53. The Fourteenth Amendment to the United States Constitution protects the Hearing Officer in fulfilling his duties in his function of holding hearings on the denial, the stopping or reduction of Federally funded grants in aid to children, the unborn, and needy persons.

Appendix "L"—Petitioner's Reply to Joseph R. Healy Affidavit.

Rand U. of the Supreme Court of Canada said:

"What could be more malicious than to punish this licensee for having done what he had an absolute right to do. . .?"
Roncarelli v. Duplessis (1959), 16 D.L.R. 2d 689 at 708

The punishment was the destruction of his economic life said that Court. The Supreme Court of Canada held such actions a gross abuse of legal power.

53. Paragraph 39 of the affidavit of Joseph R. Healey and the interviewer omit that the petitioner specifically cited the instance where he found as a fact that no evidence of cost was introduced to deny the man racked with arthritis a wet heating pad duly prescribed by a doctor. The recommendation was changed without reference to transcript or electronic recordings. Title 18 NYCRR Reg. 358.14 (b).

54. The affidavit of Joseph R. Healey and the interviewer omit the fact of the expedite tag, ripped from the case of a woman with an unborn child five months pregnant, with no resources whatsoever and receiving $5.00 and 50¢ biweekly. (A corollary Title 18 NYCRR Section 315.16 (e) which empowers the hearing officer to grant adjournments, of necessity, permits him to expedite such a case. The law from time immemorial has afforded special protections and imposed a special duty on judges and those exercising judicial functions in the cases of infants. *Hearing Officers* are now called *Administrative Law Judges.*

Appendix "L"—Petitioner's Reply to Joseph R. Healy Affidavit.

55. The Petitioner sought to follow Sabat v. Labine, 42 NY 2d 1068 and the New York Banking Law where the agency reduced ADC by the amount of the small accounts of small childrens school thrift bank accounts. The verbatim transcript and electronic recording were totally ignored by the supervisor.

56. The Healey affidavit and interviewer omit that the petitioner specifically brought the rating where Mr. Cimorelli wrote in his own handwriting that the case was rescheduled for rehearing because petitioner allegedly failed to grasp the issues. Petitioner also brought the letter signed by Mr. Cimorelli in where the case was rescheduled at the request of the agency after the hearing because an agency witness wished to testify. The Cornell Legal Aid Society brief also confirmed the fact and the opinion of the interviewer, if in truth it is his opinion, for it is unsigned by him, a "contract" interviewer, a layman, is wholly conclusory and is based on the wholly conclusory ratings. It betrays a lack of competency to understand the obligations of the oaths to which petitioner was bound. Indeed the Healey affidavit No. 40 says this should be carefully read by the Court. The failure to "understand issues", to following "instructions" and "to have appeared to have been marching to the beat of a different drummer," are apt phrases.

57. The drummer's were the *New York Court of Appeals Sabat v. Lavine*, 42 NY 2d 1068; *Goldberg v. Kelly*, 397 U.S. 254. The case of *Swift v. Blum*, 502 F. Supp. 1140, Page 1143 and 1144 are illustrative of policy disregard of the Federal Court and the New York

Supreme Court where "a blatant disregard" by the New York State Social Service Commissioner was found. (The responsible persons are the staff.)

58. The *Civil Service Department Manual for Hearing Officers* states at page 19:

> In administrative hearings the concept of due process of law ultimately controls and effects the work of the Hearing Officer. Exhibit H-1.

59. The unborn child of a young black mother five months pregnant who was receiving every two weeks five dollars and fifty cents was legally a person under Federal Constitutional standards. The mother of these children and the man racked by arthritis and the children were persons protected by the Fourteenth Amendment. The Petitioner a citizen, a lawyer and a Hearing Officer was likewise protected in his duty by the Fourteenth Amendment.

60. The review overlooked that the performance ratings were in most areas satisfactory. In the areas where they were unsatisfactory they were contradictory. one was on attitude. The other by the rater who had regularly supervised petitioner for the longest period specifically said "extremely conscientious and diligent."

61. The Cimorelli ratings were by a man who supervised the Petitioner less than two months. (See ground rules Exhibit 14-2-One of the Cimorelli ratings-Report No. 1, asserting rescheduling of a case because of failure to recognize issues is flatly contradicted by his own letter and independently by the Cornell Legal Aid Brief. This rating itself which petitioner brought to the attention of the Civil Service Department and

Appendix "L"—Petitioner's Reply to Joseph R. Healy Affidavit.

Commissioners and made an exhibit-throughout does not even appear in the record filed by Mr. Healey and the Attorney General and which petitioner specifically pointed out in the Civil Service interview by Mr. Engel.

62. The affidavit of Joseph R. Healey and the interviewer omit that the Petitioner specifically cited the instances where he pursuant to N.Y. Statute and the New York Court of Appeals recommended assistance not be reduced by the amount of small childrens school thrift bank accounts. The supervisor and the Social Services nonetheless issued a decision overruling the New York State Court of Appeals and the Statutory Law on childrens' school bank accounts. Annexed hereto and made a part hereof is Exhibit D that Fair Hearing Decision issued by respondent Blum's office overruling the law of that Court. Further annexed is the affidavit of Jerry C. Leak, Exhibit D.

63. The foregoing factors, the Cimorelli falsehood, a contradiction in his own hand on issues and rescheduling, Exhibit 3-3 of the Healey affidavit and the contradiction further corroborated by the concealed

Appendix "L"—Petitioner's Reply to Joseph R. Healy Affidavit.

Cornell Legal Aid Briefs show that Mr. Cimorelli used falsehood in his rating. This fact has been concealed throughout.

64. The need for substantiation by documentation is reflected by the Civil Service Department December 8, 1978 Dermody letter, Exhibit C herein has been concealed.

65. The ground rules providing that a person doing an evaluation have supervised the employee for at least three months has been totally ignored in the case of Mr. Cimorelli. Mr. Cimorelli's rating on attitude is refuted by Mr. Lasner's statement extremely "conscientious and diligent". The ratings are further refuted by the evaluations of

a. Albert G. Krenitsky of Vogt, Hensel and Krenitsky (Exhibit 16-6)

b. V. Michael Liccione, Chief Attorney, Oneida County Dept. of Social Services (Ex. 16-7)

c. Miriam Karp, Attorney, who ran Social Services Emergency Food Stamps hearing calendar in N.Y.C.

d. Mathew Jasen, Court of Appeals Judge, letter to Civil Service Commission August 24, 1970 Exhibit 16-10

e. Paul Coburn, Attorney and Secretary State Tax Commission, March 3, 1980 letter, Exhibit 16-1

f. James T. Murphy, Attorney, Onondaga Neighborhood Legal Services, Exhibit 16-14, 15

Appendix "L"—Petitioner's Reply to Joseph R. Healy Affidavit.

g. Thaddeus J. Naskiewicz, (Attorney for many years) Social Services Attorney, Cayuga County Dept. of Social Services Exhibit 16-16

h. Harrison S. Downs, Sr. (Attorney for 30 years) Social Services Attorney, Ontario County, Exhibit 16-17

i. Marie Wilson, Fair Hearing Representative, Chemung County, Exhibit 16-18

j. Richard A. Gleason, Attorney Gleason, Foulke, Magill and Hewitt, Auburn, New York Exhibit 16-19

1981

66. On December 1, 1982 the petitioner attended a public forum held by Governor Hugh Carey, Commissioner Blum and other commissioners at Buffalo, New York with many people present. The petitioner described the instance of the expedite tag for the young black woman five months pregnant with an unborn child receiving $5.50 every two weeks as her total means of existence.

67. Commissioner Blum personally told petitioner she was very grateful that petitioner was concerned about that situation and was appreciative that there were persons who would care about the situation.

68. The Fourteenth Amendment protects petitioner:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any

person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

69. The Healy affidavit fails to withstand the facts and law. Petitioner is entitled to the relief prayed for in his petition.

L. ROBERT LEISNER
L. ROBERT LEISNER
Petitioner

Subscribed and sworn to before me this 20 day of March, 1982.

CHERYL KEETON
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1983

APPENDIX "M"

Notice of Appeal to Court of Appeals

(Same Title.)

SIRS:

PLEASE TAKE NOTICE that the above named L. ROBERT LEISNER, pursuant to CPLR 5601 (b) (1) hereby appeals from an order of the Appellate Division, Third Department, entered in the Clerk of the Appellate Division on the 9th day of November, 1983 and served on the appellant on November 26, 1983, which order 1) unanimously affirmed the judgment of the Supreme Court, Albany County entered on June 24, 1982 in the office of the Albany County Clerk and which order finally determines this proceeding where there is directly involved the construction of the Fourteenth Amendment of the U. S. Constitution, the due process clause of the State Constitution and the Civil Service protection provisions of the New York State Constitution and the Constitutional Oath and Supremacy Clause under Article VI of the U. S. Constitution, and which order 2) also unanimously affirmed parts of an order of the Supreme Court, Albany County, entered on Dec. 9, 1981 in the office of the Albany County Clerk and which order finally determines actions herein where there is directly involved the construction of the Fourteenth Amendment of the U. S. Constitution, and Title 42 USC Sections 1983 and 1985, the due process clause of the State Constitution and the Constitutional Oath and Supremacy Clause under Article VI of the U. S. Constitution and the Civil Service protection provisions of the New York State

Appendix "M"—Notice of Appeal to Court of Appeals.

Constitution, and the appellant appeals from each and every part of said order of the Appellate Division which affirmed.

DATED: December 23, 1983
Buffalo, N. Y.

Yours, etc.

L. ROBERT LEISNER
Pro Se Petitioner-Appellant
Office and P. O. Address:
One Arundel Road
Buffalo, N.Y. 14216
TEL: (716) 838-2393
TEL: (716) 234-8831

To:
Robert Abrams
Attorney General
Attorney for the Respondents and Defendants
The Capitol
Albany, N.Y. 12224
TEL: (518) 474-3197

APPENDIX "N"

Schedule of Reports and "Bill of Rights" day class Order

First Probationary period:

Report No. 1 at R. 133
Report No. 2 at R. 134
Report No. 3 at R. 172

Second Probationary period:

Report No. 1 (12/6/78) at R. 165 (see Appendix "O")
Report No. 2 at R. 176

* * *

Report No. 1 at R. 165 referring to the "rescheduling"
The rescheduling letter at R. 164 (see Appendix "O")
The Petitioner's Memo enclosing the two Cornell briefs at R. 165 (see Appendix "O")
The two Cornell briefs with the issues and the *Swift v. Toia* Decision on the Supremacy clause at R. 278-287
The *Swift v. Toia* case citation in the Cornell briefs at R. 285

* * *

See Appendix "J" at page 33a
The "Bill of Rights" day class order *Swift v. Toia*

* * *

The assertion of the "blatant disregard" of *Swift v. Toia sub nom. Swift v. Blum* 502 F.2d 1143. see Appendix "L" at page 42a

* * *

The demands for relief R. 110, 111, 242

EDITOR'S NOTE

PAGES 51a thru 57a WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Petitioner's Record Filed August 7, 1981 with Court.

HARRISON S. DOWNS
Attorney
DAVID B. TRUMBULL
Deputy Commissioner
Director of Administrative Services

CATHERINE WHITE
Director of Social Services

MARGARET THOMPSON
Director of Income Maintenance

DONATO FIORENTINO
Director of Public Relations
Staff Development Coordinator

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES

Canandaigua, New York 14424
Telephone: (716) 394 - 1440

IRWIN ROCKOFF, Commissioner

November 18, 1980

New York State
Civil Service Commission
Building 1, State Campus
Albany, NY 12239

Attention: Lorraine Serra

Dear Sirs and Madam:

Re: L. Robert Leisner's Performance as Fair Hearing Officer at this Office on the Matter of David L. Conyard October 18, 1978.

In the captioned matter involving very complex and pecuniarily important issues of fact and law, throughout which I represented this Department and its interests, Mr. Leisner, with whom I had no contact until then, exhibited exemplary reserve and impartiality, expertise, courtesy, patience and consideration of others, to the point of continuing that hearing all afternoon and for well over an hour after the usual closing time here so that all concerned might present the necessary evidence and their respective contentions without having to return another day to do so, which was visibly appreciated by the quadriplegic involved and others who came some distance for that hearing.

Mr. Leisner's same performance and attributes as a Hearing Officer were so unusual in my experience as a practicing lawyer throughout this State since 1949 (until March of 1973 as a trial lawyer in private practice and thereafter as the attorney for this Department) that I am happy to oblige his request for this evaluation of that performance. In fact, I sincerely regret that he has not been the Hearing Officer on other matters in which I have participated.

Sincerely yours,

Harrison S. Downs, Sr.

Harrison S. Downs, Sr.
Social Services Attorney

HSD/rj

cc.: L. Robert Leisner, Esq.

51a

APPENDIX "O"

A performance evaluation by an experienced trial lawyer and Social Services Attorney for Ontario County

Petitioner's Record Filed August 7, 1981 with Court.

STATE OF NEW YORK — DEPARTMENT OF SOCIAL SERVICES

MEMORANDUM

Form DSS-524 (Rev. 11/68)
Formerly BOA-100

TO: Michael A. Cimorelli — DATE: December 22, 1978
Supervising Hearing Officer

FROM: L. Robert Leisner — SUBJECT: December 6, 1978
Hearing Officer — Probation Evaluation Report

Respecting the evaluation I wish to bring to your attention some facts which are important. Please associate this memo with it.

1. Understanding issues your narative discorption

only one hearing has ever been rescheduled and this was to allow an agency witness to testify to matters within her personal knowledge because she was not at the original hearing. (your letter of November 13, 1978 * and Cornell legal aid briefs Carpenter **)

2. Dependability I have covered all calendars assigned to me and additionally covered calendars for Mr. Sweeney when ill, Mrs. O'Brien when a relative died, Mr. Lasner when he was called to other hearings and unable to do the Joseph Fluckinger hearing, and Mr. Vetter when he was ill.

Enclosure: * 1 memo

** 2 Briefs

L. Robert Leisner
Hearing Officer

53a

December 22, 1978 Memorandum to Supervisor Subject Probation evaluation Report encloses supervisors rescheduling letter of November 13, 1978* and Cornell legal aid briefs carpenter**

26

Petitioner's Record Filed August 7, 1981 with Court.

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
40 NORTH PEARL STREET, ALBANY, NEW YORK 12243

BARBARA B. BLUM
Commissioner

November 13, 1978

Ms. Marnie Kirchgessner
Tompkins County Department of
Social Services
108 Green Street East
Ithaca, New York 14850

Re: Fair Hearing
Mildred Carpenter

Dear Ms. Kirchgessner:

In my phone conversation with you relative to the above fair hearing, you stated that you were unable to be present and to testify on matters within your own personal knowledge. You further indicated that such information was not presented to the hearing officer by the agency representative. Accordingly, I have reopened and rescheduled the hearing to be held in your agency on November 20, 1978, at 10:00 a.m. The hearing officer will be Robert Leisner.

Sincerely yours,

Michael A. Cimorelli

Michael A. Cimorelli
Supervising Hearing Officer

MAC:dew

55a
November 13, 1978 rescheduling letter
Mildred Carpenter—Fair Hearing—
at Ithaca, N.Y.

27

Petitioner's Record Filed August 7, 1981 with Court.

DSS-395 (REV. 8/78) **PROBATION PERIOD EVALUATION REPORT** NYSDSS

EMPLOYEE NAME	EMPLOYEE TITLE	UNIT AND LOCATION	
Leisner, Robert	Hearing Officer	Office of Legal Affairs Admin. Procedures, Syracuse	
APPOINTMENT DATE	**PROBATION DURATION**	**REPORT NO.**	**REPORT DUE DATE**
10/26/78	12 WEEKS From To	1	12/7/78

SECTION I: IMMEDIATE SUPERVISOR'S EVALUATION OF EMPLOYEE'S SERVICE
(When comparing the service of this employee with other employees, please consider the length of employment.)

YES	NO	
✓		QUANTITY OF WORK - Keeps work reasonably up to schedule
	✓	QUALITY OF WORK - Work is acceptable and conforms to prescribed work methods
	✓	APTITUDE - Responds to training, shows learning progress and ability to comprehend work routine
	✓	WORK HABITS - Application of effort to assigned duties/uses time wisely
✓		RELATIONSHIP WITH OTHERS - Cooperates with fellow employees and supervisor
✓		ATTENDANCE - Maintains satisfactory attendance and is punctual both in reporting and rest periods
	✓	OTHER TRAITS - Fully capable of performing duties of position
		- Tactful
	✓	- Dependable
		- Stable under pressure
		FOR SUPERVISORY EMPLOYEES - Properly motivates and directs subordinate employees

SECTION II: ACTION (check either A or B below)

		EXPLANATION OF RESPONSE SECTION IIB
A	Further evaluation necessary	
✓	Continue Probation period	
	Second Probation period	
B	Final Report	
	Retention and Permanent appointment (give reasons for recommending early completion of probation) ▶	
	Termination - (give reason for recommendation) ▶	

SECTION III: SUMMARY EVALUATION

YES	NO	
	✓	The employee has performed assigned duties in a satisfactory manner during this report period

SECTION IV: NARRATIVE DESCRIPTION OF SERVICES - include proficiencies and deficiencies (Attach additional sheet)

Employee does not have grasp of Law and Regulations, expected for professional person who has been exposed to the work of this bureau for the length of time employed and hearings held. He has missed the issues in individual hearings, necessitating rescheduling and rehearing of the request in at least one instance. Although gives impression of cooperating, also shows casual attitude toward work. I would like an opportunity to discuss or reply to this. *1 *2

SECTION V: SIGNATURE

This report has been discussed with me and I have a copy of it. I am aware that my signature on this report does not necessarily indicate my agreement with the evaluation, but merely signifies that I have received a copy of this report.	EMPLOYEE SIGNATURE	DATE
	X L. Robert Leisner	12/6/78
IMMEDIATE SUPERVISOR'S SIGNATURE	**DATE**	**BUREAU/OFFICE HEAD SIGNATURE** / **DATE**
X Robert A. Cincotti	12/6/78	X [illegible] /

SECTION VI: PERSONNEL BUREAU ACTION

☐ Permanent Appointment	☐ 2nd Probationary Period	☐ Terminate Effective	PERSONNEL REPRESENTATIVE SIGNATURE	DATE
Effective _____		_____	X	

57a

Probation Evaluation Report No. 1, December 6, 1978 "rescheduling" and rehearing

Section IV: Narrative Description of Services:

"Employee does not have grasp of Law and Regulations expected for professional person who has been exposed to the work of this bureau for this length of time holding hearings. He has missed the issues in individual hearings necessitating[1] rescheduling and rehearing of the request in at least one instance, although gives impression of cooperating, also shows casual[2] attitude toward work."

[1] [2] I would like an opportunity to discuss or reply to this.

APPENDIX "P"
MAGNA CARTA

45 "We will not make any justices, constables, sheriffs, or bailiffs, *but of such as know the law of the realm and mean duly to observe it.*

39 "No freeman shall be taken or imprisoned, or disseised, or outlawed or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by lawful judgment of his peers, or *by the law of the land.*

63 "It is also sworn, as well on our part as on the part of the barons, that all things aforesaid shall be observed bona fide and without evil subtily."

Guarantees of Due Process of Law and Equal Protection are written into our Federal and State constitutions.

> "A written constitution would be of little avail as a practical and useful restraint upon the different departments of government, if a literal interpretation was to be given to it, to the exclusion of all necessary implication, and the clear intent ignored, and slight evasions or acts, palpably in evasion of its spirit should be substained as not repugnant to it. The restraints of the constitution upon the several departments, among which the powers of government are distributed cannot be lessened by inference or implication, and usurpations of power, or the exercise of power in disregard of the express provision or plain intent of the instrument, as necessarily implied from all its terms, cannot be substained under the pretense of a liberal or enlightened interpretation, or in deference to the judgment of the legislature, or some supposed necessity, the result of a changed condition of affairs." (citings) *People ex rel. Boulton v. Albertson.* 55 NY 50, at 55.

The Constitution protects and demands integrity from the humblest judge. *Tumey v. Ohio.* 273 U.S. 510.

L. ROBERT LEISNER